Pall Biomedical Products Corporation, a Division of Pall Corporation *and* Local 365, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO. Cases 29–CA–18545 and 29–CA–19565

August 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, AND HURTGEN

The complaint in this case[1] alleges that the Respondent unlawfully refused to bargain with the Union in three respects: (1) by revoking a letter of agreement providing that the Respondent would extend recognition to the Union at the Port Washington, New York facility if one or more employees performing unit work were employed there; (2) by refusing to permit the Union access to the Port Washington facility; and (3) by refusing to furnish the Union with requested information relating to the staffing of the Port Washington facility. The judge found that the letter of agreement was a nonmandatory subject of bargaining which the Act did not obligate the Respondent to honor. The judge further found that the Respondent's refusals to grant the Union's requests for access and information did not violate the Act because the requests derived from the Union's attempts to enforce the nonmandatory letter of agreement.

Having considered the judge's decision in light of the exceptions and briefs, we have decided, for the reasons set forth here, to rule as follows on the issues raised by the complaint: (1) to reverse the judge and find that the Respondent's repudiation of the letter of agreement violated Section 8(a)(5) and (1) of the Act; (2) to affirm the judge and find that the Respondent's refusal to permit the Union access to the Port Washington facility did not violate Section 8(a)(5) and (1) of the Act; and (3) to reverse the judge and find that the Respondent's refusal to furnish the Union with certain requested information violated Section 8(a)(5) and (1) of the Act.

I. FACTS

The material facts are undisputed.[2] For many years, the Union has represented certain employees at the Respondent's East Hills and Glen Cove, New York locations.[3] In 1990, the Respondent purchased the Port Washington facility and, the Union sought to include it in the contractual unit. A strike ensued, which was settled when the parties entered into the following letter of agreement, dated March 14, 1990:

> The Employer agrees that in the event that it employs one (1) or more employees performing bargaining unit work at the Employer's facility in Port Washington, NY, the Employer will extend recognition over such employees to Local 365, UAW. After extension of recognition the Employer and Union will meet to discuss the terms and conditions of employment for such employees.

While it is clear that recognition is conditioned on bargaining unit work being performed at the Port Washington facility, the letter of agreement is silent as to whether the Union must first demonstrate majority support among the Port Washington employees.

In 1994, the Union learned that the Respondent was moving a laboratory from Glen Cove to Port Washington. The operation of the equipment in that laboratory at Glen Cove had been performed by bargaining unit employees. In addition, the Union learned that the Respondent was hiring new employees at Port Washington in positions with titles and duties similar to those of unit employees.

Relying on the letter of agreement, the Union requested permission to visit the Port Washington facility to determine whether unit work was being performed there. After an exchange of letters, the Respondent stated that it revoked the letter of agreement. The Union filed an unfair labor practice charge resulting in a June 1995 unilateral settlement agreement in which the Respondent reaffirmed the letter of agreement and agreed to permit the Union access to the Port Washington facility for the purpose of determining whether unit work was being performed there.

During two visits on September 13 and 22, 1995, the Union observed unit work being performed at Port Washington. On September 29, 1995, the Union demanded that, pursuant to the letter of agreement, the Respondent recognize it as the representative of the Port Washington employees and requested certain information. Subsequently, the Union requested a third visit to the Port Washington facility.

The Respondent refused to recognize the Union as the representative of the Port Washington employees. On October 11, 1995, the Union accused the Respondent of revoking the letter of agreement, stated that the Port Washington facility was an accretion to the existing bargaining unit, requested additional information, and requested access to the facility.

The Union requested further information on October 12, 1995, and subsequently filed an unfair labor practice charge. On October 13, 1995, the Respondent wrote the Union that it has "withdrawn from the [1995 unilateral] settlement agreement and has reaffirmed its previous

[1] On January 31, 1997, Administrative Law Judge Steven Davis issued the attached decision in this proceeding. The General Counsel and the Charging Party each filed exceptions and a supporting brief, and the Respondent filed an answering brief.

[2] At the hearing the Respondent declined to put on any of its own witnesses.

[3] The collective-bargaining agreement defines the unit as:

> All employees located at the East Hills facility and the Glen Cove facility but excluding all office employees, officers, supervisors, salespeople, draftspeople, engineers, degreed scientists and all supervisors as defined in the Act.

revocation of the 1990 Letter Of Agreement." On October 24, 1995, the Respondent stated that it would not provide any of the requested information.

Although there is evidence that some Port Washington employees were performing bargaining unit work, there is no evidence that the Union obtained majority support among the Port Washington employees. In addition, the record fails to show that any unit employees from the East Hills and the Glen Cove facilities were transferred to the Port Washington facility to perform unit work. Finally, the complaint does not allege that the Respondent was obligated to recognize the Union as the representative of the Port Washington employees or to apply the terms of its collective-bargaining agreement to them. Rather, as set forth above, the complaint alleges that the Respondent violated Section 8(a)(5) by revoking the letter of agreement, by refusing to grant the Union's requests for access to the Port Washington facility, and by refusing to provide the information the Union requested on September 29 and October 11 and 12, 1995.

II. DISCUSSION

A. The Repudiation of the Letter of Agreement

The first issue to be addressed is whether the Respondent violated Section 8(a)(5) of the Act by revoking the letter of agreement. As the judge recognized, resolution of this issue turns on whether the letter of agreement was a mandatory or permissive subject of bargaining. If, as the General Counsel and the Charging Party contend, the letter of agreement was a mandatory subject of bargaining, then the Respondent's repudiation of it constituted an unfair labor practice prohibited by Sections 8(a)(5) and 8(d) of the Act. See *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 185 (1971) (Act is violated only when employer "changes a term that is a mandatory rather than permissive subject of bargaining").

In *Pittsburgh Plate Glass*, the Court held that the subjects for mandatory bargaining are generally limited to "issues that settle an aspect of the relationship between the employer and employees." 404 U.S. at 178. Recognizing that matters involving individuals outside the employment relationship do not fall within that category, the Court further explained that these matters are not wholly excluded. The Court stated that "in each case the question is not whether the third-party concern is antagonistic to or compatible with the interests of bargaining-unit employees, but whether it vitally affects the 'terms and conditions' of their employment." Id. at 179.

The Board has applied the above principle to so called "after-acquired store clauses," whereby the employer agrees to recognize the union as the representative of, and apply the collective-bargaining agreement to, employees in stores acquired after the execution of the contract. The leading case in this area is *Kroger Co.*, 219 NLRB 388 (1975). In *Kroger*, the parties included in their collective-bargaining agreement an after-acquired store clause providing that the employer would recognize the union as the bargaining representative of "all employees . . . in stores operating in the State of Texas." The clause provided that these additionally recognized employees would all be in the same unit. Thereafter, the union demanded recognition as the representative of the employees working in two new stores, and offered to prove that it had card majorities among the employees sought. The employer, however, refused to honor the union's demand for recognition.

The Board interpreted the after-acquired store clause as waiving the employer's right to a Board-conducted election and requiring the employer to recognize the union upon proof of majority status. The fact that the clause itself did not contain an explicit condition that the union obtain the support of a majority of the employees in a new store was immaterial because the Board said that it would impose such a condition as a matter of law. Accordingly, the Board concluded that the employer violated Section 8(a)(5) by its breach of the after-acquired store clause and its refusal to recognize the Union as the representative of the employees in the two new stores.

Because the Act requires adherence only to mandatory, not permissive terms, *Pittsburgh Plate Glass*, supra, the implicit holding of *Kroger* was that the after-acquired store clause in that case was a mandatory subject of bargaining.[4] That point was further developed in the Board's subsequent decision in *Lone Star Steel*.[5] In that case, the Board considered whether the union violated Section 8(b)(3) of the Act by insisting to impasse on an "application-of-contract" clause, requiring extension of

[4] Citing two cases, the Respondent argues that "[s]ubsequent decisions have made clear that even the Board no longer considers [a] *Kroger* . . . clause to be a mandatory subject of bargaining." We disagree and find the Respondent's reliance on the two cases to be misplaced.

In *A-1 Fire Protection, Inc*., 250 NLRB 217, 220 (1980), remanded 676 F.2d 826 (D.C. Cir. 1982), on remand 273 NLRB 964 (1984), enfd. 789 F.2d 9 (D.C. Cir. 1986), the Board merely categorized the *Kroger* case as one in which the clear and unmistakable waiver standard was applied to determine whether the employer waived its statutory right to petition the Board for an election.

In *Triple A Maintenance Corp*., 283 NLRB 44 fn. 2 (1987), the Board found that the respondent did not violate Sec. 8(a)(5) by its alleged refusal to comply with a *Kroger*-type clause. Most significantly, the Board observed that the collective-bargaining agreement containing the *Kroger*-type clause had expired at the time the respondent allegedly refused to honor it. *Kroger* clauses, involving as they do a waiver of a statutory right, generally do not survive the contracts that contain them. See *Holiday Inn of Victorville*, 284 NLRB 916 (1987). Therefore, the alleged refusal of the respondent in *Triple A Maintenance* to comply with the *Kroger*-type clause in the expired contract could not constitute a violation of Sec. 8(a)(5). To the extent that language in *Triple A Maintenance* can be read as suggesting that a *Kroger* clause is not a mandatory subject of bargaining, such language was mere dicta because it was not necessary to support the decision reached by the Board.

[5] *Mine Workers (Lone Star Steel*), 231 NLRB 573 (1977), enf. denied 639 F.2d 545 (10th Cir. 1980), cert. denied 450 U.S. 911 (1981), supplemental decision 262 NLRB 368 (1982).

the applicable collective-bargaining agreement to all new operations of the employer (including those that did not compete with the work performed by the employees). Unlike the clause at issue in *Kroger*, the "application-of-contract" clause was not limited to adding additional employees to the existing unit, but would have extended the collective-bargaining agreement to employees who were concededly outside the bargaining unit.

Applying the principles of *Pittsburgh Plate Glass*, the *Lone Star Steel* Board held that, like the after-acquired clause in *Kroger*, the "application-of-contract" clause was a mandatory subject of bargaining. Although that clause differed from the *Kroger* clause in that it extended the contract to employees outside the unit, the Board found that it nonetheless "vitally affects" the terms and conditions of employment of the unit employees because it removed economic incentives which might have otherwise encouraged the employer to transfer the work out of the bargaining unit. 231 NLRB at 576.

On review, the 10th Circuit denied enforcement of the Board's decision in *Lone Star Steel*.[6] Reversing the Board's finding that the "application-of-contract" clause was a mandatory subject of bargaining under the "vitally affects" test, the court held that the clause was not directed towards any specific problem and thus was "much broader than necessary to accomplish the legitimate Union goal of protecting" jobs and wages. 639 F.2d at 558.

We need not address in this case the issue raised in *Lone Star Steel* regarding clauses that apply to all new operations or facilities of an employer. As set forth above, the instant letter of agreement specifically pertains to bargaining unit work performed at only one other facility in the same geographical area, the Respondent's Port Washington facility. Thus, the clause is clearly more limited in scope than the broad "application-of-contract" clause at issue in *Lone Star Steel*.

Further, we find that the General Counsel has shown by a preponderance of evidence that the clause in this case was in fact directed at the concerns of the unit employees and "vitally affects" their terms and conditions of employment. The record shows that in 1990 unit employees were so concerned about the possibility that bargaining unit work would be transferred to the Port Washington facility that they engaged in a strike. The strike did not end until the Respondent executed the letter of agreement. Moreover, 4 years later, the Respondent did, in fact, transfer equipment worked on by unit employees from Glen Cove to Port Washington, and the Respondent began hiring new employees at Port Washington in positions with titles and duties similar to those of unit employees. We find that these facts are sufficient to establish that the clause "vitally affects" the unit under the *Pittsburgh Plate Glass* test.[7]

In finding the clause to be a nonmandatory subject, the judge relied on two factors which he found distinguished this case from *Kroger*. We find neither distinction persuasive.

First, the judge stated that in *Kroger* the union represented a majority of the employees in the new stores, while in this case the Union has not demonstrated its majority at the Port Washington facility. While that observation is true, it is not relevant to the complaint allegations in this case. Here, unlike *Kroger*, there is no contention that the Respondent was obligated to recognize the Union as the representative of the Port Washington employees. Rather, according to the General Counsel, the Respondent's obligation was to honor the letter of agreement and extend recognition to the Union only if at some later date it achieved majority status. Therefore, the absence of a showing that the Union presently represents a majority of the Port Washington employees has no bearing on the issues before us.

Of course, the letter of agreement itself does not require the Union to demonstrate majority support at Port Washington. As discussed above, such a requirement was likewise absent from the after-acquired store clause in issue in *Kroger,* and the Board nevertheless held that the clause was valid. In this respect, the instant case is not distinguishable from *Kroger,* as suggested by Member Hurtgen's dissent, but rather closely resembles it. Thus, contrary to our dissenting colleague, we find that the letter of agreement should be given a "*Kroger* gloss." As the Board did in *Kroger* and similar cases, we here have construed the agreement at issue as requiring the showing of majority support before it may be properly applied. In *Kroger*, the Board imposed the condition of majority status "as a matter of law" and to preserve the legality of the provision. Because we view the letter of agreement as serving a purpose similar to that of an after-acquired provision, we impose a similar requirement on the letter of agreement.

Second, the judge stated that in *Kroger* the employees working in the new stores would be absorbed into the existing bargaining unit, while in this case the Port Washington employees would constitute a separate bargaining unit. Again, while the judge's observation may well be true, we do not find it to be significant.[8] A

[6] 639 F.2d 545 (10th Cir. 1980).

[7] These facts also appear to satisfy the 10th Circuit's concern in *Lone Star* that the agreement be directed toward remedying "a specific problem over which the parties had disagreed," and that it accomplishes "the legitimate union goal of protecting employees against a shift" of bargaining unit work to a nonunit facility. 639 F.2d at 558.

[8] As indicated above, a similar distinction was rejected by the Board in *Lone Star*. Although the 10th Circuit denied enforcement in that case, as indicated above it appeared to do so because of the breadth of the clause (i.e., the fact that it applied to all new operations that might have no affect on unit employees), not because the employees at those facilities would not be added to the unit.

Kroger after-acquired store clause protects against the erosion of the terms and conditions of employment of existing unit employees by absorbing the new employees into the unit and applying the terms of the collective-bargaining agreement to them. Even if the letter of agreement contemplated the placement of the Port Washington employees in a separate bargaining unit, under its terms the Union would still be able to accomplish the same objective: If the Respondent began performing bargaining unit work at Port Washington, the Union would be in a position to protect the interests of the existing unit employees by achieving recognition as the bargaining representative of the Port Washington employees and negotiating terms and conditions of employment for them similar to those enjoyed by the East Hills and Glen Cove employees. If labor costs at the two facilities were substantially the same, there would be no economic incentive for the Respondent to transfer work from one to the other. In sum, whether the letter of agreement contemplates that the two groups of employees will be in the same or different units is not dispositive; what is critical is that the employment of employees at Port Washington performing bargaining unit work "vitally affects" unit employees and that the letter of agreement is specifically addressed to that concern.

We recognize, as the judge stated, that the Union sought recognition from the Respondent "for the Port Washington unit, even in the absence of a showing of majority representation, in violation of *Kroger*." The Respondent, however, did not simply reject the Union's demand for recognition; instead, it explicitly informed the Union that it was revoking the letter of agreement. The Respondent clearly had options readily available to it short of revoking the letter of agreement in its entirety. Given that our national labor policy favors the honoring of voluntary agreements reached between employers and labor organizations,[9] the Respondent should have resorted to one of these alternatives instead of repudiating its commitment to the Union.

Specifically, the Respondent could have simply rejected the Union's interpretation of the letter of agreement and lawfully insisted that the Union achieve majority status among the Port Washington employees before recognition would be extended. Alternatively, the Respondent could have challenged the Union's invoking the agreement by filing an 8(b)(1)(A) unfair labor practice charge against the Union. In this regard, Board has held that it is unlawful for a union to demand and accept recognition as the bargaining representative of a group of employees, who may constitute a separate appropriate unit, at a time when the union does not represent a majority of those employees. E.g., *Melbet Jewelry Co*., 180 NLRB 107, 110 (1969). Indeed, when the Union filed its unfair labor practice charge against the Respondent, the Regional Director dismissed it insofar as it alleged that the Respondent was obligated to recognize the Union for the Port Washington unit in the absence of evidence that the Union enjoyed majority status at Port Washington.

Although the Union's interpretation of the letter of agreement as requiring immediate recognition without regard to majority status could lead to unfair labor practice charges, the Respondent was not thereby privileged to repudiate the letter of agreement. The Respondent could have taken the "reasonable step" of simply rejecting the Union's interpretation. The Respondent instead took the destructive step of outright repudiation. Contrary to our dissenting colleague, we do not view outright repudiation as taking a "reasonable step."

For all these reasons, we find, contrary to the judge, that the parties' letter of agreement was a mandatory subject of bargaining and that the Respondent violated Section 8(a)(5) and (1) of the Act by revoking it.

B. The Refusal to Grant the Union's Access Requests

The second issue to be discussed is whether the Respondent violated Section 8(a)(5) of the Act by refusing to grant the Union's requests for access to the Port Washington facility. Like the judge, we dismiss this allegation of the complaint, but we do so on the ground that the record shows that the Union's requests were linked to its improperly invoking the letter of agreement to seek recognition in the absence of majority support.

As the judge found, the Respondent permitted the Union to visit the Port Washington facility on two afternoons in September 1995. These visits were in accordance with the terms of the June 1995 settlement agreement which granted the Union access to the Port Washington facility for the purpose of determining whether bargaining unit work was being performed there.

In a September 29, 1995 letter to the Respondent's attorney, the Union's attorney stated that during the visits, union representatives observed individuals performing bargaining unit work. The Union's attorney demanded that, pursuant to the letter of agreement, the Respondent recognize the Union as the exclusive collective-bargaining representative of the Port Washington employees.

In October 1995 the Union made oral and written requests for a morning visit to the Port Washington facility. In an October 11, 1995 letter to the Respondent's attorney, the Union's attorney again claimed that the Union represented the Port Washington employees, adding that they constituted an accretion to the existing bargaining unit and demanding that the collective-bargaining agreement be applied to them. Referencing "the NLRB settlement agreement and the parties collective bargaining agreement," the letter gave the following reasons for the request for a third visit to Port Washington:

[9] See *Retail Clerks Local 455 v. NLRB*, 510 F.2d 802, 807 fn. 20 (D.C. Cir. 1975), citing, inter alia, Sec. 301 of the Act.

> Obviously, there are different employees performing different functions at the facility, which may constitute bargaining unit work, during the morning hours. In addition, bargaining unit work may be performed in those areas of the plant which the Union has not yet been permitted to visit, of which areas the employee union representatives have already made the Pall Representatives aware. In addition to the reasons already articulated, permit me to advise you that the Union now wishes to visit the plant to ensure compliance with the terms of the collective bargaining agreement, to seek execution of union membership and dues checkoff authorization forms, and to ensure management is not engaged in direct dealing with bargaining unit employees, among other reasons.

Having carefully considered the record as a whole, we find the Respondent was not obligated to grant the Union a third visit to the Port Washington facility. The record shows that by October 11 the Union was convinced that bargaining unit work was being performed at Port Washington and that, by operation of the letter of agreement, the Port Washington employees had become part of the bargaining unit covered by the collective-bargaining agreement. As discussed in the preceding section, the Union's interpretation of the letter of agreement was erroneous as a matter of law because the Union had not achieved majority status among the Port Washington employees. Given this background, we find that the reasons advanced by the Union for requesting a third visit to Port Washington cannot logically be separated from its demand that it be recognized as the bargaining representative of the Port Washington employees. Thus, the October 11 letter explicitly stated that the request for access is "to ensure compliance with the terms of the collective bargaining agreement," including the union security clause, even though the collective-bargaining agreement could not lawfully be extended to the Port Washington employees. See *Melbet Jewelry*, 180 NLRB at 110. In addition, the October 11 letter stated that access was necessary to prevent "direct dealing with bargaining unit employees." The Union may one day be able to challenge "direct dealing." But as of October 11 the Port Washington employees were not "bargaining unit employees." We recognize that the letter referred to another reason for the access request, i.e., to determine whether bargaining unit work was being performed by employees whom the Union had not observed during its first two visits. In the context of the Union's improper demands for compliance with the terms of the contract, however, this reason appears to have been linked to the Union's attempt to ascertain whether there were additional Port Washington employees who the Union could claim were covered by the contract.

Accordingly, having found that the Union's requests for access to the Port Washington facility were tied to its demands for recognition and extension of the collective-bargaining agreement, we conclude that the Respondent's refusal to grant the requests did not violate the Act.

C. The Refusal to Provide Requested Information

The final issue to be discussed is whether the Respondent violated Section 8(a)(5) of the Act by refusing to furnish the Union the information it requested in its letters of September 29 and October 11 and 12, 1995. The relevant principles are well established.

"There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967). A failure to fulfill the obligation to furnish relevant information upon request "conflicts with the statutory policy to facilitate effective collective bargaining." *Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1315 (8th Cir. 1979).

The duty to furnish information turns on "the circumstance of the particular case." *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149, 153 (1956). The key question in determining whether information must be produced is "one of relevance." *Emeryville Research Center v. NLRB*, 441 F.2d 880, 883 (9th Cir. 1971). Certain information is considered "so intrinsic to the core of the employer-employee relationship as to be presumptively relevant . . . ." *Electrical Workers IBEW v. NLRB*, 648 F.2d 18, 24 (D.C. Cir. 1980).

When the requested information pertains to employees outside the bargaining unit, however, such as the Port Washington employees here involved, there is no such presumption, and the union has the "initial burden to show relevancy." *NLRB v. Associated General Contractors*, 633 F.2d 766, 770 (9th Cir. 1980), cert. denied 452 U.S. 915 (1981). This burden is not a heavy one. "The Supreme Court has adopted a liberal, discovery-type standard by which relevancy of requested information is to be judged." *NLRB v. Leonard B. Hebert, Jr. & Co*., 696 F.2d 1120, 1124 (5th Cir. 1983), citing *Acme Industrial*, supra. The Union need only be "acting upon the probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Acme Industrial*, supra, 385 U.S. at 437.

Applying these principles to the facts of this case, we find, as explained below, that the Union made a showing of probable relevance sufficient to impose on the Respondent an obligation to supply the requested information. In its September 29, 1995 letter, the Union stated:

> [W]hile touring the [Port Washington] plant, the Company representative advised the Union representatives that she could not answer many of their questions, and invited them to submit inquiries in writing. Accordingly, without prejudice to the Union's demand for

> immediate recognition, and pursuant to the settlement of the above-referenced NLRB charge, the Union requests the following information regarding individuals working at the Port Washington facility which is reasonably necessary and relevant to its representative responsibilities.

The text of the Union's information request is attached to the judge's decision as an appendix. In substance, the Union sought the names of all employees performing bargaining unit work at Port Washington, and their job classifications, job descriptions, departments or functions, grades, and shifts.

Significantly, the Union did not link its September 29, 1995 information request to its improper demand for recognition. On the contrary, the Union was careful to state that its request was independent of its demand for immediate recognition and to express a separate, legitimate reason for its September 29 request, i.e., that the information was "necessary and relevant to its representational responsibilities."

Further, we find that, under the *Acme Industrial* standard, the Union has shown that the information it sought was of probable relevance to the performance of its statutory duties and responsibilities. Specifically, the requested information would be of use to the Union in administering the letter of agreement it had negotiated on behalf of the East Hills and Glen Cove employees it represented. As discussed in section II,A, supra, under the 1990 letter of agreement, the Respondent was obligated to recognize the Union as the bargaining representative of the Port Washington employees if they performed bargaining unit work and, as a matter of law, if a majority of them selected the Union. Based on its September 1995 tours of the Port Washington facility, the Union had a reasonable basis for believing that unit work was being performed there. In these circumstances, the information the Union requested relating to the staffing of the Port Washington facility was relevant in assisting the Union to determine precisely which job classifications made up the Port Washington bargaining unit that the Union might one day represent. Certainly, the Union cannot possibly seek to represent a bargaining unit without knowing the scope and composition of that unit.

In addition, the requested information would assist the Union in communicating with the Port Washington employees to determine if they desired union representation. After all, the Union is no "stranger" to these employees, for their employer has agreed that, if a majority of them select the Union, their employer will recognize the Union as their bargaining representative pursuant to the letter of agreement. As stated in *Kroger*, supra, "The Board has held that an employer may agree in advance of a card count to recognize a union on the basis of a card majority, and we can perceive of no reason why it may not contract with the union to do so in advance of the time the union has commenced organizing." 219 NLRB at 389 (footnote omitted). Having negotiated such a contract with the Respondent and having learned that there were employees at Port Washington performing bargaining unit work, the Union was entitled to information from the Respondent that would assist it in fulfilling *Kroger*'s majority status requirement and enforcing its rights under the letter of agreement.

By letter dated October 12, 1995, the Union supplemented its September 29, 1995 request by seeking information concerning the terms and conditions of employment of all employees in the Port Washington unit. Like its first information request, the information the Union sought on October 12, 1995, was of probable relevance to the performance of its statutory duties and responsibilities in connection with administering the letter of agreement. For example, this information would be useful to the Union not only in organizing the Port Washington employees if it were to show that their terms and conditions of employment were inferior to those of the East Hills and Glen Cove employees that the Union already represented but also in protecting labor standards of existing unit employees. See *Lone Star Steel*, 231 NLRB at 575.

Accordingly, for the above-stated reasons, we find that the Respondent was obligated to furnish the Union the information it requested in its letters of September 29 and October 12, 1995, and that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to do so.[10]

AMENDED CONCLUSIONS OF LAW

1. By revoking the March 14, 1990 letter of agreement, the Respondent has unlawfully refused to bargain in violation of Section 8(a)(5) and (1) of the Act.
2. By refusing to furnish the Union with the information it requested on September 29 and October 12, 1995, the Respondent has unlawfully refused to bargain in violation of Section 8(a)(5) and (1) of the Act.
3. The above unfair labor practices affect commerce within the meaning of the Act.

[10] By contrast, we find that the Respondent did not violate the Act by failing to furnish the Union the information it requested in its October 11, 1995 letter. The October 11 letter requested the names, addresses, and home telephone numbers of all employees, except for those explicitly excluded by the bargaining agreement, at the Port Washington facility and detailed descriptions of every occasion in which employees at East Hills or Glen Cove worked at Port Washington and vice versa, the nature of the operations at Port Washington, the identity and responsibilities of administration and labor relations management at all facilities, and labor relations policies at all facilities. The only reason the Union offered for this information request, however, was its claim that it was the bargaining representative of the Port Washington employees. As we have repeatedly stated above, the Union's demand for recognition as the bargaining representative of the Port Washington employees was improper. Accordingly, we conclude that the Respondent was not obligated to honor the October 11, 1995 request, and we shall dismiss the complaint insofar as it alleges that the Respondent violated the Act by failing to do so.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to reaffirm the letter of agreement, and to furnish relevant information to the Union in accord with our decision.

ORDER

The National Labor Relations Board orders that the Respondent, Pall Biomedical Products Corporation, a Division of Pall Corporation, East Hills, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 365, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO, as the exclusive bargaining representative of the employees in the bargaining unit, by revoking the March 14, 1990 letter of agreement with the Union and by failing and refusing to furnish the Union with information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees. The unit is:

> All employees located at the East Hills facility and the Glen Cove facility but excluding all office employees, officers, supervisors, salespeople, draftspeople, engineers, degreed scientists and all supervisors as defined in the Act.

(b) In any like or related matter interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reaffirm the March 14, 1990 letter of agreement and notify the Union in writing that it has done so.

(b) Furnish the Union the information it requested on September 29 and October 12, 1995.

(c) Within 14 days after service by the Region, post at its facilities in East Hills, Glen Cove, and Port Washington, New York, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent since August 22, 1994.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed in so far as it alleges violations not found.

MEMBER HURTGEN, dissenting.

I do not agree that the relevant clause here is a mandatory subject of bargaining. Accordingly, the repudiation of the clause was not unlawful under Section 8(a)(5).

The Union represents the Employer's employees at East Hills and Glen Cove, New York.

The relevant clause reads as follows:

> The Employer agrees that in the event that it employs one (1) or more employees performing bargaining unit work at the Employer's facility in Port Washington, NY, the Employer will extend recognition over such employees to Local 365, UAW. After extension of recognition the Employer and Union will meet to discuss the terms and conditions of employment for such employees.

My colleagues analogize the clause herein to the clause in *Kroger Co*., 219 NLRB 388 (1975). In my view, the clauses are markedly different. In *Kroger*, the clause (as construed) required the employer to recognize the union in any newly acquired store, provided that majority status was shown at that store. In the instant case, the clause requires the Employer (the Respondent) to recognize the Union at a new facility if "one or more employees" performs unit work there. Thus, the clause mandates recognition even if only one employee is performing unit work at the new facility. The clause operates without regard to majority status and indeed without regard to whether the employee (who is performing unit work) is a transferee from the represented unit. Thus, the application of the clause would result in an 8(a)(2) and 8(b)(1)(A) unfair labor practice. That is, the Port Washington facility is a separate unit, and the Union did not have majority status there. Clearly, recognition in these circumstances would be unlawful. Accordingly, since the clause would produce an unfair labor practice, it is not a mandatory subject of bargaining.

My colleagues seek to avoid this result by saying that the Respondent should have sought a lawful interpretation of the clause (i.e., add a "majority" requirement) or the Respondent should have filed an 8(b)(1)(A) charge.

I disagree. The Union was the drafter and proponent of the clause. It was therefore not the responsibility of the Respondent to try to render it lawful. Nor must the Respondent attack it as an unfair labor practice. Instead, the Respondent took the reasonable step of simply de-

[11] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

clining to apply it, inasmuch as such application would have resulted in an unfair labor practice by the Respondent.

My colleagues attempt to avoid the 8(a)(2) consequences of the clause by giving the clause a "*Kroger* gloss," i.e., reading into the clause a requirement of majority status. In my view, the clause is different from the one in *Kroger* and cannot be given a "*Kroger* gloss." In *Kroger*, the clause simply required recognition at newly acquired stores. The Board read into the clause a requirement that majority status must be shown at any such store. By contrast, the instant clause already states the requirement for recognition, and that requirement has nothing to do with majority status at the new facility. Where, as here, the parties have set forth a condition for recognition, it is wholly unrealistic to read into the clause a different condition.

In sum, the clause, on its face, requires recognition upon the bare showing that one or more unit employees performs work there.

In addition, I conclude that the clause would not be a mandatory subject even if it contained a "majority" requirement. In this regard, I note (as do my colleagues) that the general rule is that a clause pertaining to a different unit (i.e., different from the one in which the clause is proposed) is not a mandatory subject. Under the Act, parties must bargain about terms and conditions of employment *in the bargaining unit*; they may not "clog up" that bargaining with extraneous matters. My colleagues concede the general rule, but rely on an exception. If the clause "vitally affects" terms and conditions of employment in the unit in which bargaining occurs, the clause can be a mandatory subject. Thus, for example, assume that an employer operates a unionized grocery store and a nearby nonunion grocery. If it is shown that market forces are such that the nonunion store is undermining the economic conditions at the union store, the employees at the unionized store may have a legitimate interest in bargaining about transforming the nonunion store into a union store and applying the contract there. However, in the instant case, there is no evidentiary showing that the nonunion character of Port Washington is having an economic impact on the Union's facilities at East Hill and Glen Cove. Indeed, the clause is not triggered by the presence of any such impact, but rather by the mere fact that an employee at Port Washington performs unit work there. In sum, there *may be* economic forces which render the nonunion character of Port Washington relevant to the bargaining at East Hills and Glen Cove, but those facts have not been shown.

My colleagues seek to show that the nonunion character of Port Washington is having an economic impact on the represented units. They state that employees in the represented units were concerned about the transfer of unit work to Port Washington. However, the instant clause does not address that problem. It does not forbid or even limit such transfers. Nor does it provide that the contract will apply to Port Washington so as to take away the economic incentive to transfer work there. Rather, the clause simply mandates recognition.

In sum, inasmuch as Port Washington is a separate unit, the General Counsel was required to show that the conditions there would vitally affect the conditions at East Hills and Glen Cove.[1] That showing has not been made.

My colleagues respond that no such showing was made in *Kroger*. However, the result in *Kroger* did not turn on the "mandatory vs. permissive" issue. Rather, *Kroger* was simply an application of the *Snow & Sons* principle.[2] That is, if an employer agrees to recognize a union upon a showing of card majority, the Board will enforce that agreement. The employer has waived its right to a Board election. The Board in *Kroger* simply applied that principle. The Board in *Kroger* did not even discuss its holding in mandatory vs. permissive terms. Thus, the Board did not even discuss, much less resolve, the question of whether a union can "clog up" the bargaining in unit A by insisting on a clause relating to unit B. As discussed above, the general rule is that a union cannot do so, unless it can be shown that the conditions at B "vitally affect" the conditions at A.

Further, even if *Kroger* is read to hold that the clause therein was a mandatory subject, that holding would not apply to the instant case. The *Kroger* clause provided that the new stores would be in the same unit as the extant stores. By contrast, under the instant clause, the Port Washington facility is to be a different unit.[3] Thus, the instant clause is nonmandatory because it relates to a different unit.

My position is supported by the court's decision in *Lone Star Steel Co. v. NLRB*,[4] In that case, the court dealt with a clause that would apply the contract to other facilities. The court held that the clause was a nonmandatory subject.

My colleagues seek to distinguish *Lone Star Steel* on the basis that the clause there pertained to all new facilities of the employer. By contrast, my colleagues note, the instant clause pertains to only one facility, i.e., Port Washington. The distinction is without a legal difference. Where, as here, the clause pertains to a different unit, the clause is nonmandatory, irrespective of whether the different unit is comprised of one facility or many facilities. The nonmandatoriness of the clause is based on the fact that it pertains to a different unit, rather than on the number of such units.

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[1] *U.S. Postal Service*, 308 NLRB 1305, 1308 (1992).

[2] 134 NLRB 709 (1961).

[3] The instant clause provides that, after recognition, the parties will bargain. If the parties intended for Port Washington to be in the same unit, the contract would apply.

[4] 639 F.2d 545 (10th Cir. 1980), cert. denied 450 U.S. 911 (1981).

Further, even if one accepts the Board's decision in *Lone Star*, the case offers no help to my colleagues. In that case, the clause would apply the contract to the other unit only if the employer became obligated to recognize the union there. And, by applying the contract, the clause removed the economic incentive to transfer work from one unit to another. By contrast, in the instant case, the clause forces recognition in the other unit, and it does not apply the contract there.

Based on all of the above, I conclude that the clause is not a mandatory subject, because it calls for an unlawful result. And, even if that defect were cured, the clause is nonetheless a nonmandatory subject.

Finally, since the clause is not a mandatory subject, the Respondent was not required to furnish information sought with respect thereto.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with Local 365, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO, as the exclusive bargaining representative of the employees in the bargaining unit, by revoking the March 14, 1990 letter of agreement and by failing and refusing to furnish the Union with information relevant and necessary to its role as the exclusive bargaining representative of the unit employees. The unit is:

All employees located at our East Hills facility and the Glen Cove facility but excluding all office employees, officers, supervisors, salespeople, draftspeople, engineers, degreed scientists and all supervisors as defined in the Act.

WE WILL NOT in any like or related matter interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reaffirm the March 14, 1990 letter of agreement and notify the Union in writing that we have done so.

WE WILL furnish the Union the information it requested on September 29 and October 12, 1995.

PALL BIOMEDICAL PRODUCTS CORPORATION, A DIVISION OF PALL CORPORATION

Marcia Adams, Esq., for the General Counsel.

G. Peter Clark, Esq. (Clifton Budd & DeMaria, LLP), of New York, New York, for the Respondent.

Jamie Rucker, Esq. (Eisner & Hubbard, P.C.), of New York, New York , for the Charging Party.

DECISION

STEVEN DAVIS**,** Administrative Law Judge. Based on a charge in Case 29–CA–18545 filed on September 16, 1994, by Local 365, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO (the Union), and based on a charge in Case 29–CA–19565 filed on October 17, 1995, by the Union, Region 29 of the Board on March 29, 1996, issued a complaint against Pall Biomedical Products Corporation, a Division of Pall Corporation (the Respondent or Pall).

The complaint alleges that Respondent unlawfully refused to bargain with the Union by (a) revoking a letter of agreement between them which provided that Respondent would extend recognition to the Union at its after-acquired Port Washington facility if one or more employees were employed there, (b) refusing to permit the Union access to its Port Washington facility, and (c) refusing to provide certain information requested by the Union.

Respondent's answer denied the material allegations of the complaint, and on October 22, 1996, a hearing was held before me in Brooklyn, New York. Respondent's unopposed motion to correct the transcript is granted.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, having its principal office at 2200 Northern Boulevard, East Hills, New York, and having other places of business located at 30 Sea Cliff Avenue, Glen Cove, New York, and at 25 Harbor Park Drive, Port Washington, New York, is engaged in the manufacture and wholesale distribution of filtration devices.

During the past year, Respondent sold and shipped from its New York facilities products and materials valued in excess of $50,000 directly to points located outside New York State. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent also admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union has represented the employees of Respondent at its East Hills and Glen Cove locations for many years. Their collective-bargaining agreement sets forth the appropriate collective-bargaining unit as follows:

> All employees located at the East Hills facility and the Glen Cove facility but excluding all office employees, officers, supervisors, salespeople, draftspeople, engineers, degreed scientists and all supervisors as defined in the Act.

In 1990, Respondent purchased a facility in Port Washington, New York. That year, while the parties were engaged in negotiations for a new agreement, the Union sought to have the Port Washington facility included in the contractual unit already recognized. At that time and apparently until 1994, that location remained empty with no work being performed there.

No agreement was reached upon economic terms, benefits, or an agreement on the inclusion of the Port Washington facility in the contract, and the employees struck. Thereafter, agreement was reached on wages and benefits. Regarding the Port Washington facility, the parties entered into the following letter of agreement, dated March 14, 1990:

> The Employer agrees that in the event that it employs one (1) or more employees performing bargaining unit work at the Employer's facility in Port Washington, NY, the Employer will extend recognition over such employees to Local 365, UAW. After extension of recognition the Employer and Union will meet to discuss the terms and conditions of employment for such employees.

By entering into this agreement, the Union effectively withdrew its bargaining demand that the Port Washington facility should be part of a single unit comprised of the East Hills, Glen Cove, and Port Washington locations.

In about June 1994, it came to the attention of the Union that the SLS laboratory was being moved from Glen Cove to Port Washington. The operation of the equipment in that laboratory at Glen Cove had been performed by bargaining unit employees such as electricians, plumbers, mechanics, machine builders, and welders.

In addition, on August 21, 1994, a help wanted advertisement appeared in a local newspaper, seeking "shipping receiving clerk/chemical handler" at its "Technical Center, a new state-of the art-facility." The address set forth in the ad was the Port Washington facility. The job titles of shipping clerk and chemical handler are unit positions,and the duties described in the ad, transporting and transferring chemicals, are performed by unit employees. Further, Richard Van Wickler, an employee of Respondent and a union committee chairperson, was advised by coworkers that their friends and relatives applied for positions at the Port Washington facility.

On July 19, 1994, K. Dean Hubbard, the Union's attorney, sent a letter to Pat Lowy, Respondent's director of human resources. The letter stated that Hubbard had been informed that employees at Port Washington were performing work normally performed by members of the bargaining unit. He requested that union representatives be granted permission to enter the facility in order to determine whether work "currently being performed should be performed by members of the Union." The Union's attorney enclosed a copy of the Letter of Agreement.

On July 26, Thomas Budd, Respondent's attorney replied, asking what "work" Hubbard was referring to.

On August 3, Hubbard answered, stating that the work referred to was all work performed by all employees of Respondent in its bargaining unit. Hubbard also stated that the parties' collective-bargaining agreement requires Respondent to admit the Union to its plants.

The contract provides as follows:

> Officers and representatives of the Union shall be granted admission to the plants during working hours for the purpose of investigating conditions in the plant or investigating or adjusting grievances, complaints or disputes.

On August 22, Budd replied to Hubbard's August 3 letter. In the letter, Budd stated that Respondent revoked the letter of agreement. He noted that the letter of agreement contains no termination date, was not part of the collective-bargaining agreement, and was no longer effective. Budd stated that if the Union wanted to represent the Port Washington employees it would have to file a petition with the Board. Respondent refused to permit access to the Port Washington facility, noting that the contractual provision, above, related only to the 2 recognized units—East Hills and Glen Cove.

On September 16, the Union filed a charge in Case 29–CA–18545. The charge alleged that Respondent refused to bargain in good faith with the Union in violation of Section 8(a)(5) of the Act by (a) refusing to permit access to the Port Washington facility and (b) unilaterally revoking the letter of agreement.

A unilateral settlement agreement of the charge was signed by the Respondent in June 1995, and approved by the Regional Director, pursuant to which Respondent agreed to (a) reaffirm the letter of agreement and (b) permit the Union, on request, to enter the Port Washington facility and answer questions by the Union regarding the work and functions being observed, for the purpose of investigating and "determining whether work performed by employees employed by us in the bargaining unit is being performed by the employees of the Port Washington Technical Center."

Pursuant to the settlement agreement, two visits to the Port Washington facility took place, in the afternoons of September 13 and 22, 1995. Six people were present for the Union, including Van Wickler. Pursuant to agreed-on arrangements, the visits consisted of an escorted tour of the premises by Human Resources Director Lowy, during which the union representatives were not permitted to speak to employees.

Van Wickler testified that during the first visit, which lasted 1.5 hours, he asked Lowy who changed the light bulbs in the light fixtures, and who emptied the garbage, both of which were functions performed by bargaining unit members at East Hills and Glen Cove. Lowy said that she did not know, but assumed that the maintenance department, and a porter did those jobs. Van Wickler observed five or six employees working with wrenches on a large piece of equipment, which tasks are unit work. Lowy said the workers were employees of Respondent. One employee wore a Pall identification badge. Van Wickler noticed a forklift in the shipping department, and asked Lowy who operated the forklift, which is unit work. Lowy told him to put that question in writing, and she would respond. Van Wickler spoke to the driver of a UPS truck who had just made a delivery. The driver told him that "Cruz" signed for the delivery. Van Wickler asked Lowy if "Cruz" referred to Cruz Rosario, a nonunit employee in the purchasing department at East Hills. Lowy told him to make the request for such information in writing.

Van Wickler also noticed an employee wearing a Pall uniform handling chemicals and pouring liquids in an area marked "chemical waste." He testified that the job of chemical waste

specialist is a unit position at East Hills and Glen Cove. Van Wickler also observed a person cleaning a bathroom, which is also unit work.

During the second visit, which lasted 1 to 1.5 hours, Van Wickler noticed construction work, consisting of the installation of cabinets, electrical wiring, and plumbing, being performed in certain laboratories, all of which were unit positions, according to Van Wickler. He also observed an employee named Nicole tightening certain equipment with a torque wrench, and saw Cruz Rosario closing and taping a box. When the union representatives left the building, they spoke to Mike Basile, who they knew as a nonunit employee in Glen Cove. Van Wickler overheard a conversation on a two-way radio in which someone told Basile that he had finished cleaning certain ceiling traps. Such a function is unit work according to Van Wickler.

On September 29, Hubbard wrote to Respondent Attorney Budd, stating that during the visits, union representatives observed individuals performing bargaining unit work. Hubbard demanded recognition of the Union, pursuant to the letter of agreement, as the exclusive collective-bargaining representative of Pall's Port Washington employees. The letter further requested certain information concerning "individuals working at the Port Washington facility." The information requested included the names, number of employees, job classifications, grades, and job descriptions of all employees (a) performing bargaining unit work at Port Washington and (b) working in various, named departments.[1]

In early October, Van Wickler requested a third visit to the Port Washington facility, which he wanted to take place at about 9 a.m. He and Lowy could not agree on a time for the visit, and she asked him to put his request in writing. His written request stated that (a) there were still areas in the plant that the Union delegation had not seen and (b) the early time was needed in order to observe employees who might work earlier and who perform different functions than the workers they observed during the two afternoon visits. A third tour of the site did not take place.

On October 3, Budd wrote to Hubbard, asking whether the Union was requesting recognition in a separate Port Washington unit. In reply, Hubbard stated that pursuant to the letter of agreement, the Union was demanding that recognition be given in a separate unit of Port Washington employees. In answer, Budd wrote that Respondent did not believe that the Union represented a majority of the Port Washington employees, and refused to extend recognition to the Union for such a unit.

On October 11, Hubbard wrote to Budd stating that by refusing to recognize the Union as the representative of employees doing bargaining unit work at Port Washington, Respondent has unilaterally revoked the letter of agreement. Hubbard further stated that the Union considered the Port Washington facility as an accretion to the existing bargaining unit, and demanded application of all terms of the collective-bargaining agreement to such unit.

Hubbard further requested additional information:

> 1. Names, addresses and home telephone numbers of all employees at the Port Washington facility, excluding only employees in those job classifications expressly excluded from the bargaining unit description set forth in the parties' collective-bargaining agreement.
>
> 2. Describe in detail with respect to each of the East Hills, Glen Cove and Port Washington facilities (collectively the "Long Island facilities") (a) each and every occasion and nature and extent to which Pall employees at the East Hills or Glen Cove location have performed work at the Port Washington facility and vice versa (b) the nature of Pall's operations at the Port Washington facility, including but not limited to the relations with operations, machinery or product lines at the other Long Island facilities (c) the identity and responsibilities of each member of management for administration and/or labor relations at the Long Island facilities and (d) labor relations policies at each of the Long Island facilities.

Finally, in addition to the reasons previously given for making a third visit to the Port Washington site, Hubbard requested another visit in order to "ensure compliance with the terms of the collective-bargaining agreement, to seek execution of union membership and dues-checkoff authorization forms, and to ensure management is not engaged in direct dealing with bargaining unit employees, among other reasons."

The following day, October 12, Hubbard requested additional information:

> All terms and conditions of employment of all employees at the Port Washington facility, including but not limited to wages, hours and working conditions, excluding only employees in those job classifications expressly excluded from the bargaining unit description set forth in the parties' collective-bargaining agreement.

That day, Hubbard signed the charge in Case 29–CA–19565, in which it was alleged, inter alia, that Respondent violated Section 8(a)(5) of the Act by refusing to bargain in good faith with the Union by (a) failing to provide requested information to the Union,(b) refusing to recognize the Union pursuant to the letter of agreement and settlement agreement, and (c) failing to apply the terms of the collective-bargaining agreement to its Port Washington facility, which is an accretion to the existing unit.[2]

On October 13, Budd wrote to Hubbard advising that Respondent has "withdrawn from the settlement agreement, and has reaffirmed its previous revocation of the Letter of Agreement." Budd added that he was examining the information request contained in Hubbard's September 29 and October 11 letters and that he would advise Hubbard of Respondent's position within 2 weeks.

The charge was filed on October 17. On October 24, Budd wrote to Hubbard stating that the Union has "chosen to prosecute the issue of recognition at the Port Washington facility and the related request for information through NLRB unfair labor practice procedures. Your information request is, in essence a discovery device seeking evidence pertinent to UAW Local 365's unfair labor practice charge. In these circumstances, Pall is not required to submit to unfair labor practice-related discov-

[1] The text of the request is set forth in the appendix.

[2] The Regional Director dismissed that part of the charge which alleged that Respondent was obligated to recognize the Union for the Port Washington unit, or apply the terms of its collective-bargaining agreement to that unit, absent evidence of majority status at Port Washington, and absent evidence that such unit cannot constitute a separate appropriate unit.

ery, and therefore, it will not provide you with any of the information requested, at the present time."

B. Analysis and Discussion

The Letter of Agreement

The complaint alleges that Respondent repudiated, unilaterally terminated, and refused to honor the letter of agreement. There can be no question that by its letter of August 22, 1994, Respondent expressly and unilaterally revoked the letter of agreement and refused to honor its terms. I find that it was legally entitled to do so.

An employer may not make unilateral changes regarding matters which are subjects of mandatory bargaining. *NLRB v. Katz*, 369 U.S. 736, 737 (1962); and *Serramonte Oldsmobile, Inc*. v. NLRB, 86 F.3d 227, 232 (D.C. Cir. 1996). The question here is whether the letter of agreement was a subject of mandatory bargaining.

The General Counsel argues that the letter of agreement is a *Kroger,* after-acquired clause. *Kroger Co*., 208 NLRB 928 (1974). In that case, the employer, a chain of retail food stores, and the union had a collective-bargaining agreement which provided that the contract would cover all employees in stores that were later owned by the employer, and those employees would be included in the existing, multistore unit. The employer refused to honor the union's demands for recognition in two new stores, and the union filed a refusal-to-bargain charge.

The Board in *Kroger* dismissed the complaint on the ground that the employer was not required to recognize the union, since no agreed upon method for the union to prove its majority status in the new stores had been established.

Following remand from the District of Columbia Court of Appeals, the Board reversed its original decision, holding that the employer was required to honor its commitment to recognize the union in accordance with the after-acquired-store clause. The Board emphasized that the union had a valid card majority in the units involved "which leaves no barrier to giving full effect to the contractual commitments of the parties." The Board stated that the after-acquired clause can be read to require recognition on proof of majority status by a union. *Kroger Co*., 219 NLRB 388 (1975). The employer's statutory duty to recognize the union and to apply the contract to the new operation arises only if the union presented it with evidence of support by a majority of the new store's employees. *Joseph Magnin Co*., 257 NLRB 656, 657 (1981).

Here, there has been no showing that the Union represents a majority of the Port Washington employees.

Counsel for the General Counsel does not seek here that Respondent be required to recognize the Union for its Port Washington employees. She demands only that Respondent honor its Letter of Agreement, and be found to have unlawfully revoked it. General Counsel claims that Respondent is required to honor the letter of agreement as a *Kroger* clause because it refers to an after-acquired shop. Although the Union has not now demonstrated its majority status among the Port Washington employees, the General Counsel contends that the Union may at a later date obtain such status, and then properly demand recognition and bargaining.

Mine Workers (Lone Star Steel), 231 NLRB 573, 576 (1977), the Board, citing *Pittsburgh Plate Glass*, infra, stated that "where an after acquired clause contemplates the accretion or absorption of employees into an existing unit, the matter constitutes a subject for mandatory bargaining."[3] Respondent argues, of course, that the Port Washington unit was considered by the parties, as set forth in their Letter of Agreement, as a separate bargaining unit, as to which a separate agreement would be negotiated if unit work was performed there.

Thus, Respondent argues that the Letter of Agreement is not a mandatory subject of bargaining because it did not contemplate the accretion of the Port Washington unit into the existing East Hills and Glen Cove unit. *Kroger* emphasizes that the new employees who were the subject of the after-acquired clause would be absorbed into the existing bargaining unit, and that it was implicit in the decision that the clause did not contemplate the extension of the contract to other operations.

In contrast, here the new employees in the Port Washington unit would not be absorbed into the existing East Hills and Glen Cove bargaining unit. Rather, they would be a part of a separate bargaining unit which covered only the Port Washington facility, a different operation than the existing facilities, as to which separate bargaining would take place for their terms and conditions of employment.

I can find no similarity between the facts herein and those in *Kroger,* which required the company to honor its obligation to recognize the Union as the representative of the employees at the new stores. The decision in *Kroger* was premised upon a finding that the union represented a majority of the employees in the new stores, and that the after-acquired clause acted to effect an accretion of the new stores' employees to the larger unit. Neither of those facts are present here. I accordingly find that the Letter of Agreement was not a *Kroger* clause, and that Respondent was not obligated to honor it based upon *Kroger*.

Respondent asserts that it was justified in revoking the Letter of Agreement because it is not a mandatory subject of bargaining. The Supreme Court in *Chemical & Alkali Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 178 (1971), stated that generally, subjects for mandatory bargaining include "only issues that settle an aspect of the relationship between the employer and employees. Although normally matters involving individuals outside the employment relationship do not fall within that category, they are not wholly excluded." The Court also stated that "in each case the question is not whether the third-party concern is antagonistic to or compatible with the interests of bargaining-unit employees, but whether it vitally affects the 'terms and conditions' of their employment." 404 U.S. at 179.

The General Counsel argues that even assuming the Letter of Agreement cannot be considered a *Kroger* clause, it is a subject for mandatory bargaining because it "vitally" affected the terms and conditions of the unit employees. *Pittsburgh Plate Glass*, supra. In support of this position, the General Counsel contends that the strike by the unit employees took place, in part, in order to have the Port Washington unit included in the collective-bargaining agreement which already encompassed the East Hills and Glen Cove locations. The Letter of Agreement, according to the General Counsel, was therefore of vital interest to the unit employees.

Section 8(a)(5) and (d) require an employer to bargain in good faith with its employees' representative concerning wages, hours, and other terms and conditions of employment of

[3] On remand from the 10th Circuit Court of Appeals, the Board accepted the court's decision as the law of the case, and found that the after-acquired clause was a nonmandatory subject of bargaining. *Mine Workers*, 262 NLRB 368 (1982).

bargaining unit employees. Where an employer revokes an agreement with the Union without giving the Union an opportunity to bargain with it, the employer's action violates Section 8(a)(5) of the Act. However, this rule is applicable only when the employer's action involves the terms and conditions of bargaining unit employees. "When the employer makes decisions involving the interests of individuals outside the bargaining unit, the Board will not find an 8(a)(5) violation if the employer fails to notify the union in advance of implementation unless the third-party concern . . . vitally affects the terms and conditions of bargaining unit employees' employment." U.S. *Postal Service*, 308 NLRB 1305, 1308 (1992).

In interpreting the requirements of Section 8(a)(5) and 8(d), the Supreme Court defined mandatory subjects of bargaining as including only those issues that settle an aspect of the relationship between the employer and employees. While matters affecting individuals outside the bargaining unit are not automatically excluded from the scope of mandatory bargaining, the touchstone is whether such matters "vitally affect" the terms and conditions of employment of unit employees. An indirect or incidental impact on unit employees is not sufficient to establish a matter as a mandatory subject. Rather, mandatory subjects include only those matters that materially or significantly affect unit employees' terms and conditions of employment. *United Technologies Corp*., 274 NLRB 1069, 1070 (1985).

The only ground offered by the General Counsel in behalf of a showing that the letter of agreement vitally affects the unit employees is that the unit employees were so concerned about obtaining it that they struck to obtain it, and that Respondent secured an end to the strike by executing it. It is clear that a compromise was reached pursuant to which the strike ended, and as part of that compromise the letter of agreement was executed. However, these facts do not support a finding that the letter of agreement now vitally affects the terms and conditions of employment of the unit employees.

It must also be noted that the reason for the strike was that the employees and the Union sought to have Port Washington included in the contractual unit. The Union sought and still seeks recognition for the Port Washington unit without having to show that it represented a majority of the Port Washington employees. Essentially, the Union sought an accretion of the Port Washington unit to the contractual unit. That position has been rejected by the Regional Director and the General Counsel has not embraced it here.

The Union argues that inasmuch as Respondent's reaffirmance of the letter of agreement was the quid pro quo for the Union's withdrawal of its refusal to bargain charge, Respondent should not be permitted to be relieved of its obligation to honor it. The Union's argument goes further than this, and consistent with its positions in its letters to Respondent it argues on brief that Respondent be required to bargain with it, and be prohibited from raising any doubt concerning its majority status among the Port Washington employees. The cases cited by the Union, however, all involve unions which have at one time demonstrated their majority status among the employees involved. See *NLRB v. Accurate Web, Inc*., 818 F.2d 273, 276 (2d Cir. 1978). The situation here, of course, is quite different. The Union has not demonstrated its majority status in the Port Washington unit and, according to *Kroger*, there is no requirement that Respondent recognize the Union in the absence of a showing of majority support for the Union.

Indeed, the Union's position has not changed. Here, it urges that I find Respondent obligated to recognize the Union for the Port Washington unit, even in the absence of a showing of majority representation, in violation of *Kroger*.

One could speculate that (a) assuming the Union represented a majority of the Port Washington employees and (b) bargaining began over the terms of a contract for those employees and (c) if Respondent was able to bargain a contract containing less favorable terms than its contract covering the East Hills and Glen Cove employees, then the Union could argue that such terms would vitally affect the East Hills and Glen Cove employees since Respondent would argue that if it obtained less favorable terms for the Port Washington employees, it would insist on the same terms for the East Hills and Glen Cove employees. However, no such argument was made here, and even if it had, it would be too speculative to find that the letter of agreement thereby was a mandatory subject of bargaining.

Thus, I find, in agreement with Respondent, that what the Union is seeking here is recognition in the Port Washington unit. In effect it is demanding bargaining over a scope of the unit clause, which is a nonmandatory subject of bargaining.

The scope of the unit itself does not involve wages, hours, or other terms and conditions of employment, and therefore is a permissive subject. Neither party is required to bargain over a permissive subject. *Antelope Valley Press*, 311 NLRB 459, 460 (1993). Attempting to modify an existing bargaining unit by merging it into a multiemployer bargaining unit is a permissive subject for bargaining, and insisting to impasse upon such a subject violates the Act. *Walnut Creek Honda*, 316 NLRB 139 fn. 1, 141 (1995). Even when parties have successfully bargained about a permissive subject, a party may reject the bargain without violating Section 8(a)(5). *Bricklayers*, 306 NLRB 229, 235 (1992); *Pittsburgh Plate Glass*, 404 U.S. at 187–188.

I accordingly find and conclude that the letter of agreement is a nonmandatory subject of bargaining, and that by unilaterally terminating it and refusing to continue in effect its terms, Respondent did not violate the Act.

The Requests for Access and Information

The complaint alleges that Respondent violated Section 8(a)(5) of the Act by refusing the Union's request that it enter its Port Washington facility on October 5, 1995, in order to investigate and determine whether work normally performed in the collective-bargaining unit was being performed by employees at Port Washington.

As set forth above, the Union made two visits to the Port Washington facility prior to this request, during which time its representatives were escorted through the premises by Respondent's representative.

The General Counsel's position is that the Union's requests for access and information with respect to the Port Washington facility are derived from the letter of agreement. However, the letter of agreement does not contain any provisions concerning these matters.

In *Holyoke Water Power Co*., 273 NLRB 1369, 1370 (1985), the Board established a balancing test for determining whether an employer's denial of access to its facility for the union representing its employees violates Section 8(a)(5) of the Act. The Board stated:

> [E]ach of two conflicting rights must be accommodated. First there is the right of employees to be responsibly represented by the labor organization of their choice and, second there is

> the right of the employer to control its property and ensure that its operations are not interfered with. As noted by the Supreme Court in *Babcock & Wilcox,* the Government protects employee rights as well as property rights, and "[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the other."
>
> Thus, we are constrained to balance the employer's property rights against the employees' right to proper representation.

The first question which must be decided is the nature of the "employees' right to proper representation." Access is sought at the Port Washington facility, as to which the Union has no representational rights. Indeed, that facility is outside the bargaining unit represented by the Union. Access to Port Washington is sought by the Union in order to determine whether work typically performed in the unit locations is being performed there.

If such work is being performed at Port Washington, then the Union would seek to enforce the Letter of Agreement, requiring recognition in the event that one or more persons are performing typically unit work there.

Inasmuch as I have found that the letter of agreement is a permissive subject for bargaining which Respondent had no obligation to honor and properly revoked, for the same reasons I find that the Union's request for access must be rejected.

For even assuming that further access to the Port Washington facility was permitted, and during a further visit the union representatives discovered that unit work was being performed there, Respondent would not be obligated to recognize the Union under the terms of the letter of agreement. Accordingly, the Respondent's property rights must prevail.

In addition, the Union's stated reasons for seeking access on October 5 do not support a finding that it was entitled to such access. Union attorney Hubbard's letter of October 11 requested access in order to "ensure compliance with the terms of the collective-bargaining agreement, to seek execution of union membership and dues checkoff authorization forms, and to ensure management is not engaged in direct dealing with bargaining unit employees, among other reasons." None of these reasons require Respondent to yield its property rights. Thus, there was no collective-bargaining agreement for the Port Washington employees, and no compliance could be sought with an agreement that did not exist. The collective-bargaining agreement applied only to East Hills and Glen Cove. Further, Respondent was not required to open its facility in order to permit the Union to engage in organizing there, and there were no unit employees located at Port Washington with whom Respondent could engage in direct dealing.

Regarding the Union's requests for information, as to information sought concerning matters outside the bargaining unit, the Union must show that the information sought is relevant. It must also be shown that the Union has a reasonable basis for requesting the information, consisting of sufficient evidence as to make its information request "reasonably calculated to lead to the discovery of admissible evidence." *Brisco Sheet Metal*, 307 NLRB 361, 366 (1992).

Any evidence which the Union might secure pursuant to its requests for information would be related to its attempt to have Respondent honor the letter of agreement, or, as it has argued, recognize and be required to bargain with it.

Inasmuch as I have found that Respondent had no obligation to honor the letter of agreement, and has properly revoked it, I cannot find that any of the Union's requests for information are valid. All of the requests relate to the nature of the work performed at the Port Washington facility, and the persons performing such work. As such, the requests concern a nonunit facility as to which the Union has no representational rights. No "admissible evidence" obtained from such requests could therefore be adduced in any proceeding relating to the Port Washington facility. Accordingly, none of the requests are relevant.

CONCLUSIONS OF LAW

1. Pall Biomedical Products Corporation, a Division of Pall Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 365, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act in any manner as alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

APPENDIX

The following is the text of the Union's request for information, dated September 29, 1995:

"Identify" means state the name(s) and number of employee(s), and each of their job classifications, grades and job descriptions.

"Pall" means Pall Corporation or Pall Biomedical Products Corporation.

1. Please identify all Pall employees at the Port Washington facility performing work in the [following] bargaining unit:

> All employees of Pall Corporation, and Pall Biomedical Products Corporation, located at 25 Harbor Park Drive, Port Washington, New York, but excluding office employees, officers, supervisors, salespeople, draftspeople, engineers, degreed scientists and all supervisory employees as defined in the National Labor Relations Act, as amended.

2. Please identify all Pall employees in the maintenance department.

3. Please identify all Pall employees in the shipping department.

4. Please identify all Pall employees handling the chemical waste.

5. Please identify all Pall employees performing machine building functions on the Pall SEP project.

6. Please identify all employees performing support work for the various labs (including but not limited to plumbing, electrical machining etc.)

7. Please identify all employees who do regeneration of the deionization water and who maintain said system.

8. Please identify all employees who handle the Bio-Medical waste.

9. Please identify all employees who operate the Hi/Lo.

10. Please identify all employees who do the trouble shooting and repairs in the electronics support lab.

11. What section of the building has been allocated for the CNC machines?

12. What is the classification, grade, job description and full name of Pall employee "Nicole" who was working on equipment in the Pall SEP area?

13. Does Cruz Rosario do all the receiving in the shipping dept? If not, identify other Pall employees and functions performed in the shipping and receiving department.

14. What is the classification, grade and job description for Pall employee Cruz Rosario?

15. What is the real name of the individual who was identified to the union representatives as Pat Lowy? Is that individual a Pall employee? What are that individual's classification, grade and job description?

16. What is the classification, grade and job description of a Pall employee named Michael Basile?

17. What is the classification, grade and description of a Pall employee named George Pitsios in the shipping room?

18. What is the classification, grade and description of a Pall employee named "Ralph" in the maintenance dept?

19. What person is trained and knowledgeable in handling hazardous waste material in the shipping dept. and which Pall employee performs this function?

20. Which of the above-identified employees in questions 1-19 work 2nd or 3rd shift?

21. When is the expected completion date for the maintenance room?